IN THE SUPREME COURT
STATE OF MISSOURI

ROXANNE KERPERIEN,	)	
	)	
Plaintiff/Respondent,	)	
	)	
v.	)	Appeal No. SC84747
	)	
LUMBERMENS MUTUAL CASUALTY COMPANY,	)	
	)	
Defendant/Appellant.	)	

BRIEF OF RESPONDENT ROXANNE KERPERIEN

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STATEMENT OF FACTS

Respondent Roxanne Kerperien is a resident of the State of Missouri. Appellant Lumbermen's Mutual Casualty Company is an Illinois Corporation, doing business in the City of St. Louis, State of Missouri. Appellant is a casualty insurer that writes policies of workmen's compensation insurance.

On or about December 27, 1994, Respondent was injured in the course and scope of her employment with Quality Cleaning Service, Inc. Appellant wrote a policy of workers' compensation insurance for Quality Cleaning Service, Inc., that included the applicable injury date of December 27, 1994. As a result of her injury, Respondent made a claim under the Missouri Worker's Compensation Act, bearing Injury Number 94-184379.

On or about December 12, 1996, Respondent entered into a Stipulation for Compromise Settlement of her claims against Quality Cleaning Service, Inc. As a result of the Stipulation, Respondent received benefits for medical, temporary total disability and permanent partial disability totaling $116,192.53. Said Stipulation for Compromise Settlement was entered into in the City of St. Louis.

As a further result of said injury, Respondent filed suit in the United States District Court for the Eastern District of Missouri against a third-party. As a result of said action, on or about August 3, 1999, a jury returned a verdict in favor of Respondent, finding that Respondent had suffered damages in the amount of $2,500,000 and that Respondent bore Twenty Five Percent (25%) comparative fault, resulting in a judgment of $1,875,000. Legal File 18. Post trial motions challenging the verdict and judgment in the third-party case were filed. Prior to the trial court's ruling on said motions, Respondent and the third-party entered into an agreement to resolve the case for $1,175,000. This amount was $175,000 in excess of the defendant's available insurance coverage and $1,125,000

more than the $50,000 that was offered pre-trial. Legal File 21. Said sum was paid to Respondent. With regard to the third party claim, Respondent paid attorneys fees in the amount of $470,000 and expenses in the amount of $31,505.80.

On or about January 14, 2000, Respondent filed an action for declaratory judgment to determine Appellant's subrogation interest. The matter was submitted on stipulated facts and briefs of the parties. On November 30, 2000, the trial court entered an order and declaratory judgment awarding Appellant $31,064.92 in full satisfaction of the appellant's workers' compensation subrogation interest. Legal file 47-48 .

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN DECLARING THAT APPELLANT WAS ENTITLED TO RECOVER $31,064.92 BECAUSE THE COURT PROPERLY CONSTRUED AND APPLIED MISSOURI REVISED STATUTE SECTION 287.150.3 IN THAT THE TRIAL COURT USED THE TOTAL DAMAGES AWARDED BY THE TRIER OF FACT TO CALCULATE THE EMPLOYER'S REIMBURSEMENT AS WELL AS THE AMOUNT ACTUALLY RECOVERED, AS CLEARLY MANDATED BY THE PLAIN LANGUAGE OF THE STATUTE.

Section 287.150 (RSMo)

American Standard Insurance v. Hargrave, 34 S.W.3d 88 (Mo. banc 2000)
Abrams v. Ohio Pacific Exp., 819 S.W.2d 338 (Mo. banc 1991)
Wolff Shoe Co. v. Director of Rev., 702 S.W.2d 29 (Mo. banc 1988)
Sermchief v. Gonzales, 660 S.W.2d 683 (Mo.banc 1983)

II. THE TRIAL COURT DID NOT ERR IN ITS CONSTRUCTION AND APPLICATION OF MISSOURI REVISED STATUTE SECTION 287.150.3 IN THAT THE TRIAL COURT'S CALCULATION OF THE EMPLOYER'S RECOVERY ACCOUNTED FOR THE TOTAL DAMAGES AS FOUND BY THE TRIER OF FACT.

Section 287.150 (RSMo)

Seitz v. Lemay Bank & Trust, Co., 959 S.W.2d 458 (Mo. banc 1998)
Bethel v. Sunlight Janitor Service, 551 S.W.2d 616 (Mo. banc 1977)
Sheldon v. Bd. of Tr. of Police Ret. Sys., 779 S.W.2d 553 (Mo. banc 1989)
Minnick v. South Metro Fire Protection Dist., 926 S.W.2d 906 (Mo. App. W.D. 1996)

III. THE TRIAL COURT DID NOT ERR IN DECLARING THAT APPELLANT WAS ENTITLED TO RECOVER $31,064.92 BECAUSE §287.150.3 DOES NOT CALCULATE SUBROGATION INTEREST BASED UPON THE FINALITY OF

THE JUDGMENT AND, THUS, WHETHER A SUBSEQUENT SETTLEMENT OR SATISFACTION "ANNULLED" THE JUDGMENT IS IRRELEVANT.

Blackstock v. Kohn, 994 S.W.2d 947 (Mo. banc 1999)
Andes v. Albano , 853 S.W.2d 936 (Mo. banc 1993)

STANDARD OF REVIEW

The standard of review with regard to a claim of error in a court tried case is that this Court must affirm the judgment of the trial court unless there is no substantial evidence to support the judgment, the judgment is against the weight of the evidence, or it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. 1976). Questions of law are reviewed by this Court de novo. Endicott v. Display Technologies, Inc. 77 S.W.3d 612 (Mo. Banc 2002).

RELEVANT STATUTE

Employers and their insurers are subrogated to the rights of employees against third parties and are entitled to a portion of any verdict or settlement achieved. These subrogation rights are set forth in §287.150 (RSMo) which states, in relevant part:
"1. Where a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his dependents would have been entitled to recover. Any recovery by the employer against such third person shall be apportioned between the employer and the employee or his dependents using the provisions of subsections 2 and 3 of this section. . . .
3. Whenever recovery against the third person is effected by the employee or his dependents, the employer shall pay from his share of the recovery a proportionate share of the expenses of the recovery, including a reasonable attorney fee. After the expenses and attorney fee have been paid, the balance of the recovery shall be apportioned between the employer and the employee or his dependents in the same ratio that the amount due the employer bears to the total amount recovered if there is no finding of comparative fault on the part of the employee, or the total damages determined by the trier of fact if there is a finding of comparative fault on the part of the employee. Notwithstanding the foregoing provision, the balance of the recovery may be divided between the employer and the employee or his dependents as they may otherwise agree. …"

It is helpful to restate the terms of the statute in a mathematical formula. There are two possible formulae that may be applied, depending upon whether or not there has been a finding of comparative fault. In all cases, one must first determine the net recovery after attorney's fees and expenses. This is achieved as follows: ***Gross Recovery (GR) – Attorneys Fees (AF) – Expenses (E) = Net Recovery (NR).*** There is no dispute as to this aspect of the formula. Both parties agree that this is a proper statement of the formula

and as to the amounts, which are: ***$1,175,000 - $470,000 (AF) - $31,505.80 (E) = $668,494.20 (NR).***

After this initial calculation, the formulae differ depending upon whether there has been a finding of comparative fault by a finder of fact. In comparative fault cases, the formula is as follows: ***Employer Payments (EP)/Total Damages (TD) = Ratio(R).*** Then, one simply multiplies the Net Recovery (NR), calculated above, by the Ratio (R) to achieve the Subrogation payment: ***NR x R=Subrogation Payment.***

In cases in which there has been no finding of comparative fault, the formula to be applied is: ***Employer Payments (EP)/Gross Recovery (GR) = Ratio (R).*** Then the same resulting formula (NR x R = Subrogation Payment) is applied. Thus, the only difference between the two formulae is that in comparative fault cases one divides the employer payments by the total damages (as found by the trier of fact) to determine the ratio, and when there is no finding of comparative fault, the employer payments are divided by the gross recovery.

Section 287.150.3 was amended in 1993 in response to Rogers v. Home Indemnity Company, 851 S.W.2d 672 (Mo. App. 1993). Rogers was decided after adoption of comparative fault in Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983). Section 287.150.3 was amended to its current form a scant few months after the Rogers decision, which held that, in the absence of statutory language to the contrary, an employee's comparative fault could not be imputed to the employer, thus engaging in a strict reading of the clear, unequivocal language of §287.150.3 as it existed at that time. In light of the swift legislative amendment to §287.150.3, the obvious intent and effect of the amendment was to correct the result reached in Rogers and make §287.150.3 consistent with Missouri's comparative fault principles.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DECLARING THAT APPELLANT WAS ENTITLED TO RECOVER $31,064.92 BECAUSE THE COURT PROPERLY CONSTRUED AND APPLIED §287.150.3 IN THAT THE TRIAL COURT FOLLOWED THE CLEAR MANDATE AND PLAIN LANGUGE OF §287.150.3 AND USED THE TOTAL DAMAGES FOUND BY THE TRIER OF FACT AND THE ACTUAL RECOVERY TO CALCULATE EMPLOYER'S SUBROGATION INTEREST.

The trial court's judgment awarding Appellant $31,064.92 evidences a proper application of the plain language of §287.150.3 and the policy of the Workers' Compensation Act as a whole. The judgment should be affirmed.

The issue presented by this appeal is a matter of first impression. No prior Missouri case has presented this issue: Whether the comparative fault subrogation formula of §287.150.3 must be utilized to calculate an insurer/employer's subrogation interest when an injured employee has obtained a verdict against a third party that included a finding of comparative fault on the part of the employee and the employee is then able to recover only a portion of the resulting judgment.

A. The plain language of §287.150.3 mandates the trial court's judgment be affirmed.

The plain language of §287.150.3 mandates that the courts utilize the comparative fault formula in calculating the employer/insurer's subrogation interest. The statute clearly states that the comparative fault formula shall be used when a trier of fact makes a finding of comparative fault and a finding of "total damages." The statutory formula does not utilize the percentage of fault found by the jury, nor does it base the subrogation interest on the resulting net judgment. The only triggering factors are findings of (1) comparative fault and (2) total damages.

As set forth in the Statement of Facts, Respondent was injured while engaged in her employment. Her injuries were severe and life altering. Appellant Lumbermem's Mutual was the workers' compensation insurer for Kerperien's employer. Roxanne Kerperien received $116,192.53 in workers' compensation benefits, including medical benefits, temporary total disability and permanent partial disability. Legal File 17. Subsequently, Roxanne Kerperien brought a products liability case against the manufacturer of the product that caused her injuries. That case was tried to a verdict and a jury awarded Roxanne Kerperien $2,500,000 in damages, and found that she was 25% at fault for her injuries, resulting in a net judgment of $1,875,000. Legal File 18. After the filing of numerous post trial motions, the parties to that matter reached an agreement to resolve the case for $1,175,000, which represented the total of defendant's available insurance coverage and an additional $175,000. Legal File 5, 12. This amount was $1,125,000 more than the $50,000 that was offered pre-trial. Legal File 21.

There is no ambiguous language in §287.150.3. Application of the formula to the facts of this case is as follows: $1,75,000 (GR) -$470,000 (AF) - $31,505.80(E) = $673,494.20 (NR); $116,192.53 (EP) / $2,500,000 (TD) = .04647 (R); $673,494.20 (NR) x .04647 (R) = $31,297.28. The plain language of the statute must be applied by this Court and the trial court's judgment affirmed.

B. Without statutory ambiguity, this Court cannot engage in statutory interpretation.

Appellant Lumbermens Mutual asserts that the statute does not address a post-trial settlement and, therefore, this Court must engage in statutory interpretation and examine the intent of the legislature. It is Respondent's position that the statute is clear and application of the statute to the facts of this case is unambiguous. Therefore, no statutory interpretation is necessary.

"Where the language of the statute is unambiguous, courts must give effect to the language used by the legislature." American Standard Insurance v. Hargrave, 34 S.W.3d. 88, 90 (Mo. banc 2000). Courts may not "read into a statute a legislative intent contrary to the intent made evident by the plain language. There is no room for construction even when the court may prefer a policy different from that enunciated by the legislature." Id. To determine

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whether a statute is clear and unambiguous the courts look to whether the language is plain and clear to a person of ordinary intelligence. State Dept. So. Serv. v. Brookside Nursing, 50 S.W.3d 273, 276 (Mo. banc 2001). Van Cleave Printing v. Director of Rev., 784 S.W.2d 794, 796 (Mo banc 1990). Only in the event of ambiguity does a court engage in statutory interpretation. There is no ambiguity in this statute and thus no need to engage in any interpretation. Section 287.150.3 plainly states: "After the expenses and attorney fee have been paid the balance of the recovery shall be apportioned between the employer and the employee or his dependents in the same ratio that the amount due the employer bears to the total amount recovered if there is no finding of comparative fault on the part of the employee, or the total damages determined by the trier of fact if there is a finding of comparative fault on the part of the employee." (Emphasis added.)

The trial court simply and correctly applied the unambiguous language of the statute to the stipulated facts. There is no dispute that the "balance of the recovery" (NR) was $673,494.20. Appellant's Brief 13. Likewise, there is no dispute that there was a finding of comparative fault by the trier of fact. Legal File 7. There is no dispute that the total damages, as found by the trier of fact, were $2,500,000. Legal File 7. There is no dispute as to the amount of the employer payments (EP) - $116,192.63. Appellant's Brief 13. Given these undisputed facts, and the plain language of the statute, the trial court applied the correct formula as follows: ***$116,192.63 (EP) / $2,500,000 (TD) = .04647 (R); $673,494.20 (NR) x .04647 = $31,297.28.*** Based on the undisputed facts and the unambiguous language of §287.150.3, this Court must affirm the trial court's judgment.

In order to dispute the judgment, it is necessary for Appellant Lumbermens Mutual to engage in mental and linguistic gymnastics in an attempt to fabricate an ambiguity. Appellant argues that the plain words of the statute do not specifically address the facts of this case because, subsequent to achieving a judgment in this case, Kerperien was able to recover only a portion of the judgment. Appellant's contention that the statute does not address the situation is simply untrue. The statute does not and cannot reasonably be expected to address every conceivable permutation of verdict, judgment, comparative fault, settlement and recovery. Instead, the statute gives a simple formula to be used when there is a finding of comparative fault. It addresses total damages and actual recovery . The formula can be applied consistently to all situations. In the instant case there was a finding of comparative fault, a finding of total damages and a net recovery. The trial court utilized the plain meaning of these terms in arriving at its judgment.

The fundamental rule of statutory interpretation is to ascertain the intent of the legislature from the language used, to give effect to that intent, and in so doing, consider the words used in their ordinary and usual sense. Abrams v. Ohio Pacific Exp., 819 S.W.2d 338, 340 (Mo banc 1991). Courts cannot engage in construction where words are plain and admit to but one meaning. Id. Where there is no ambiguity, there is no need to resort to the rules of construction. Id. Finally, "the plain and unambiguous language of a statue

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cannot be made ambiguous by [judicial] interpretation and thereby given a meaning which is different from that expressed in a statute's clear and unambiguous language." Wolff Shoe Co. v. Director of Rev., 702 S.W.2d 29, 31 (Mo. banc 1988).
The language of §287.150.3 is unambiguous. The trial court utilized the plain and ordinary meaning of the language and, therefore, the judgment must be affirmed.

C. Prior holdings of this and other courts regarding statutory interpretation mandate that the trial court's judgment be affirmed.

In the event this Court determines that an ambiguity does exist, then it is guided by well-established rules of statutory construction. Sermchief v. Gonzales, 660 S.W.2d 683, 688 (Mo. banc 1983). This Court should seek to ascertain the intent of the lawmakers and to give effect to that intent. Id., citing Citizens Bank & Trust Company v. Director of Revenue, 639 S.W.2d 833, 835 (Mo. 1982). "A court normally accomplishes this task by attributing to the words used in the statute their plain and ordinary meaning." Id. citing Bank of Crestwood v. Gravois Bank, 616 S.W.2d 505, 510 (Mo. banc 1981), Kieffer v. Kieffer, 590 S.W.2d 915, 918 (Mo. banc 1979); Beiser v. Parkway School District,589 S.W.2d 277, 280 (Mo. banc 1979) and State ex rel. Conservation Commission v. LePage, 566 S.W.2d 208, 212 (Mo. banc 1978). See also Akers v. Warson Garden Apartments, 961 S.W.2d 50, 53 (Mo. banc 1998).
There are only two phrases contained in §287.150.3 that are arguably open to any interpretation: "recovery" and "total damages." With regard to "recovery," Appellant has directed this Court to a case that pre-dates the 1993 amendment to this statute, which actually supports Respondent's position and the judgment of the trial court. The Western District, in Barker v. H&J Transporters, Inc., held that "recovery" means the amount of money actually recovered from third persons. 837 S.W.2d 537, 540 (Mo. App. W.D. 1992). As Barker pre-dates the amendment, this Court must assume that the legislature was aware of Barker and its definition of "recovery" and, since the term was not further defined or amended by the legislature, the legislature accepted the definition in drafting the 1993 amendment to §287.150.3. As for its affect on the instant dispute, the trial court's judgment applied the term "recovery" in a manner consistent with Barker in calculating the judgment.
In fact, it does not appear that Appellant actually disputes the definition of recovery. Rather, Appellant contends that this Court should, in effect, add language to the statute, to this effect: "In the event of a settlement after a finding of comparative fault, the actual recovery shall be used to calculate subrogation, rather than total damages." However, that language is not in the statute and only the legislature can so amend the statute.

The second phrase arguably open to interpretation is "total damages." Again, it does not appear that Appellant disputes that the trial court properly applied the term. Appellant, in discussing the formula, applies the same undisputed amount to the term "total damages" - $2,500,000. However, Appellant argues that the total damages found by the jury should not be used in calculating the subrogation award, a position directly contrary to the plain language of §287.150.3.

"Damages" is defined by Webster's II New College Dictionary as "compensation to be paid for loss or injury." Likewise, "total" is defined as " a whole quantity: entirety." Thus, "total damages," in its plain and ordinary meaning, is the entirety of compensation to be paid for loss or injury. As this Court can see, the plain and ordinary meaning of the language used in the statute clearly supports the trial court's judgment.

D. The legislative history of §287.150.3 supports the trial court's judgment.

"Legislative intent and the meaning of words used in the statute also can be derived from the general purposes of the legislative enactment." Sermchief v. Gonzalez, 660 S.W.2d 683, 688 (Mo. banc 1983), citing Eminence R-1 School District v. Hodge, 635 S.W.2d 10, 13 (Mo. 1982). "Further insight into the legislature's object can be gained by identifying the problems sought to be remedied and the circumstances and conditions existing at the time of enactment." Id. An amended statute, such as §287.150, should be construed on the theory that the legislature intended to accomplish a substantive change in the law. Id,, citing City of Willow Springs v. Missouri State Librarian, 596 S.W.2d 441, 444 (Mo. banc 1980) and Kilbane v. Director of the Department of Revenue, 544 S.W.2d 9 , 11 (Mo. banc 1976).

The situation in the present case is analogous to the situation presented following adoption of comparative fault in 1983. In Rogers v. Home Indemn. Co., 851. S.W.2d 672 (Mo. App., W.D. 1993), the court held that adoption of comparative fault did not alter the statutory subrogation interest of the employer. Subsequently, to rectify the inequity created by Rogers, the legislature amended §287.150 to its present form. Rogers strictly applied the plain language of §287.150.3 as it existed at that time. The Rogers court did not attempt to judicially amend the statute by imposing additional language or conditions, as the majority opinion in the Eastern District did below. The fact that §287.150.3 was amended to its current form a scant few months after the Rogers decision is critical in understanding legislative intent. In light of the swift legislative amendment to §287.150.3, the obvious intent and effect of the amendment was to correct the result reached in Rogers and make §287.150.3 consistent with Missouri's comparative fault principles.

Prior to the 1993 amendment, it was irrelevant whether there was a "finding of comparative fault on the part of the employee" or "total damages" as "determined by the trier of fact." The only inquiry was the "recovery." If this Court follows the Eastern District's reasoning, the effect will be to nullify the legislature's amendment.

"In construing statutes to ascertain legislative intent it is presumed the legislature is aware of the interpretation of existing statutes placed upon them by the state appellate courts, and that in amending a statute or in enacting a new one on the same subject, it is ordinarily the intent of the legislature to effect some change in the existing law. If this were not so the legislature would be accomplishing nothing, and legislatures are not presumed to have intended a useless act."
Kilbane v. Director of Dept. of Revenue, 544 S.W.2d 9, 11 (Mo. banc 1976).

The history of §287.150.3 supports the trial court's judgment. This Court must affirm the judgment.

E. The purpose of the Workers' Compensation Act mandates that this Court affirm the trial court's judgment.

The stated purpose of the Worker's Compensation Act is to provide a method of compensation for injuries sustained by employees through accidents arising out of and in the course of employment and to place the burden of such losses on industry rather than the injured employee. Bethel v. Sunlight Janitor Service, 551 S.W.2d 616, 618 (Mo. banc 1977) (emphasis added). The Act is to be broadly and liberally interpreted in favor of the employee and any question as to the right of the employee to compensation must be resolved in favor of the injured employee. Wolfgeher v. Wagner Cartage Service, Inc., 646 S.W.2d 781, 783 (Mo. banc 1983). See also Minnick v. South Metro Fire Protection Dist., 926 S.W.2d 906, 909 (Mo. App. W.D. 1996).

The result requested by Appellant conflicts with the stated purpose of the Act by failing to follow the clear language of the statute and interpreting the Act in favor of the employer/insurer, rather than the employee. This is particularly harmful in situations such as this, when the injured employee, already the victim of a third party's negligence, cannot recover the full amount of her damages. If this court reverses the trial court's judgment and follows Judge Blackmar's reasoning in the decision below, by the very nature of the issue addressed, this decision will be cited only in those cases in which the injured employee does not collect the full damages found by a jury and thus, by definition, is not fully compensated. A reversal of the trial court's judgment will place the profits of an insurer before compensation of a victim who will bear the pain of her injuries forever.

F. The trial court's judgment does not result in a double recovery by Respondent.

Judge Blackmar, in the Eastern District's majority opinion, purported to base his opinion upon the "established principle against a double recovery." This established principle against "double recovery" should be reexamined in light of the inequitable result reached by Judge Blackmar and the conflict between Judge Blackmar's opinion and Judge Dowd's concurring opinion.

Judge Blackmar invokes the established rational that a "double recovery" by an employee is an "evil" to be avoided. The principle was first enunciated in Schumacher v. Leslie, 232 S.W.2d 913 (Mo. banc 1950). However, the legislature has repeatedly amended §287.150 in response to appellate opinions that have marched out the "no double recovery" mantra to usurp the rights of injured employees in favor of the purely economic interests of insurers. As Judge Blackmar stated in the majority opinion below, §287.150 was amended in 1955, shortly after Schumacher, to require insurers and employers to bear a proportionate share of the attorney's fees and expenses expended to achieve a recovery. Thus, the very "double recovery" found in Schumacher was reversed by legislative amendment. The "evil" became the law of this State.

The 1993 amendment, discussed supra, was clearly intended to correct the injustice of awarding insurers full subrogation when a finding of comparative fault

reduced the injured employee's award. Again, this was once considered a "double" recovery.

Judge Dowd, in an opinion that purported to concur with Judge Blackmar's opinion, specifically states that "the 'no double recovery' mantra does not withstand analysis." (Emphasis added.) He points out that in a situation in which an employee is unable to recover all the damages determined by the trier of fact, the employer/insurer recoups a "windfall paid directly by the pain and suffering of injured employees."

Given that the legislature has continuously and consistently amended §287.150 to reflect the goal of compensating the injured employee rather than limiting the liability of insurers and employers, this Court should reexamine the concept of "no double recovery" in light of this case and the injustice of the Eastern District's opinion. This Court must affirm the trial court's judgment.

G. Reversal of the trial court's judgment will be manifestly unjust.

Appellant states that this Court should presume that the legislature did not intend to enact an absurd law and should favor a construction to avoid an unjust result. Appellant's Brief, p. 11, citing Akers v. Warson Gardens Apartments, 961 S.W.2d 50, 55 (Mo. banc 1988). This is a correct statement of the law. However, it is the Appellant's position which would result in an absurd and unjust result, if adopted by this Court.

Appellant contends that this Court should ignore the jury's finding of total damages and comparative fault and apply the statutory formula for non-comparative fault claims. While Respondent vehemently disputes that application of the non-comparative fault formula is appropriate in this case, the parties do agree that application of that formula would result in a subrogation payment of $66,541.23.

The absurdity of entering a judgment of this amount is made manifestly clear when one calculates what Respondent would have been obligated to pay to Appellant had Respondent been able to collect the entire judgment of $1,875,000, as opposed to $1,175,000. In that hypothetical situation, the parties agreed that Respondent would have paid to Appellant $50,822.33. Appellant's Brief 12. Had Respondent been able to recover the entire judgment, an additional $700,000, the parties agree that application of the comparative fault formula would have been appropriate and Roxanne Kerperien would have paid to Lumbermen's Mutual $15,283.28 **less** than the majority has awarded Lumbermen's Mutual.

To award an insurer a greater amount than it would have been entitled to had the injured employee recovered the full amount of her damages, as determined by a jury, is absurd and unjust. Equity requires that this Court affirm the trial court's judgment.

II. THE TRIAL COURT DID NOT ERR IN ITS CONSTRUCTION AND APPLICATION OF MISSOURI REVISED STATUTE SECTION 287.150.3 IN THAT THE TRIAL COURT'S CALCULATION OF THE EMPLOYER'S RECOVERY ACCOUNTED FOR THE TOTAL DAMAGES AS FOUND BY THE TRIER OF FACT.

Initially, Respondent notes for this Court that this issue and argument was not raised in the court below. All arguments of the parties are contained in the briefs filed in the trial court and set forth in the legal file. Appellant's Brief in Opposition is found at pages 34 to 39 of the legal file. At no time is the argument raised in Appellant's Point II set forth. "Issues raised for the first time on appeal are not preserved for review." Seitz v. Lemay Bank & Trust, Co., 959 S.W.2d 458, 462 (Mo. banc 1998).

Assuming arguendo that this Court entertains Appellant's Point II, it is without merit. Appellant incorrectly asserts that the trial court should have utilized the comparative fault percentage as found by the jury in calculating the employer's subrogation interest. The language of §287.150.3 simply does not support this. At no point does the statutory formula utilize the comparative fault percentage to calculate the subrogation interest. Rather, the formula utilizes the total damages found by the jury. Had the legislature intended that the subrogation interest should be calculated using the comparative fault percentage, the legislature would have so stated.

Appellant apparently assumes that the legislature failed to contemplate the present factual situation in drafting the statute. There is nothing to support this contention and it is just as reasonable to assume that the legislature did contemplate the present fact situation and this is precisely why a jury's total damages finding was used to calculate subrogation, rather than the percentage of comparative fault.

Appellant offers no authority to support its position, and none exists. Appellant's Point II is a thinly disguised attempt to offer a compromise formula for this Court's adoption. Rather than adopt a compromise position, this Court should uphold the true purpose of the statutory scheme.

The purpose of the Worker's Compensation Act is to provide a method of compensation for injuries sustained by employees through accidents arising out of and in the course of employment and to place the burden of such losses on the industry rather than the injured employee and employee's family. Bethel v. Sunlight Janitor Service, 551 S.W.2d 616, 618 (Mo. banc 1977). The Act is to be broadly and liberally interpreted in favor of the employee and any question as to the right of the employee to compensation must be resolved in favor of the injured employee. Sheldon v. Bd. of Tr. of Police Ret. Sys., 779 S.W.2d 553, 561 (Mo. banc 1989). See also Minnick v. South Metro Fire Protection Dist., 926 S.W.2d 906, 909 (Mo. App. W.D. 1996).

Interpreting the Act in favor of Respondent, Appellant's Point II should be denied, and the trial court's judgment affirmed.

III. THE TRIAL COURT DID NOT ERR IN DECLARING THAT APPELLANT WAS ENTITLED TO RECOVER $31,064.92 BECAUSE §287.150.3 DOES NOT CALCULATE SUBROGATION INTEREST BASED UPON THE FINALITY OF

THE JUDGMENT AND, THUS, WHETHER A SUBSEQUENT SETTLEMENT OR SATISFACTION "ANNULLED" THE JUDGMENT IS IRRELEVANT.

Although Appellant did not raise the issue at trial or in this appeal, the majority opinion of the Eastern District is based upon the theory of jury annulment. Because jury annulment was the basis for the Eastern District's ruling, Respondent will address the issue.

The majority opinion in the Eastern District, authored by the Honorable Senior Judge Blackmar, ignored the plain language of §287.150.3 that mandates use of the comparative fault formula in this factual situation. In doing so, Judge Blackmar did not find, as Appellant argued in its brief, that there was an ambiguity that required statutory interpretation. Rather, Judge Blackmar found that by entering into a post-verdict settlement for available insurance proceeds, Respondent had "annulled" the jury's finding of comparative fault and total damages. However, Judge Blackmar does not support his opinion with citation to any case discussing "annulment."

Judge Blackmar's opinion ignores the plain language of §287.150.3 and judicially creates an incoherent statute where none need or does exist, as Judge Dowd asserts in his concurring opinion. This is particularly disturbing in light of the very cases Judge Blackmar cites to support his opinion. The majority creates the inconsistency by subjugating the clear language of §287.150.3 to prior judicial decisions that examined a version of the statute that did not contain the comparative fault formula added by the 1993 legislative amendment.

Judge Blackmar relies upon Barker v. H.J. Transporters, Inc., 837 S.W.2d 537 (Mo. App. W.D.1992) in support of his decision. In fact, Judge Blackmar's opinion is in conflict with Barker. The holding in Barker simply defines the term "recovery" to mean the amount actually collected. It held that "recovery" does not mean "judgment." 837 S.W.2d at 537. Judge Blackmar holds that Respondent "annulled" the judgment in entering into a settlement subsequent to the jury verdict. However, Barker clearly states that the "judgment" is not at issue—recovery is the determining factor, as the clear language of §287.150.3 states. The definition of the term recovery is not in dispute in this case. In fact, the party's stipulation as to the recovery was consistent with Barker. Finally, Barker was decided before the amendment to §287.150.3 which added the comparative fault formula and, consequently, Barker is not instructive in this matter. Therefore, as Judge Simon asserted in his dissent, Judge Blackmar's opinion, rather than being supported by Barker, in fact conflicts with Barker.

Judge Blackmar also relied upon Ruediger v. Kallmeyer Brothers Service, 501 S.W.2d 56 (Mo. banc 1973), which interpreted §287.150.3 as it was enacted in 1973, before the adoption of comparative fault in 1983. Since the Ruediger decision, the legislature has substantially amended §287.150.3 and, therefore, Ruediger has no precedential value in this matter.

Finally, Judge Blackmar also relied upon Rose v. Falcon Communications, Inc., 6 S.W.3d 429 (Mo. App. S.D. 1999) which held that a "phantom" attorney fee would not be imputed in calculating an insurer's subrogation interest. Rose, like Barker, stands for the general proposition that the actual recovery collected and the actual expenses and fees

paid should be used in calculating the subrogation interest, thus following the clear and unambiguous language of §287.150. As the "phantom fee" issue is not present in the instant case, the majority's reliance on Rose is a misinterpretation or misapplication of existing law.

Judge Blackmar's reliance upon these cases is misplaced. These cases do not discuss the comparative fault formula of §287.150.3. Nor do they discuss "annulment" of a finding of fact. The cases do not mandate the Eastern District's opinion.

If this Court determines that the jury's verdict was "annulled," the result would ignore the reality of litigation and would serve as a deterrent to settlement. There are numerous situations in which a litigant may be able to recover only a portion of a judgment. Matters are often settled after a jury verdict in an amount less than the full judgment. This may be because there are legitimate appeal issues that compromise the verdict. It may be that, as in the instant case, there was insufficient insurance coverage to satisfy the entire judgment or because the actions of the third party have compromised their insurance coverage. A defendant may declare bankruptcy. The parties may have entered into a high/low agreement prior to verdict. The resulting verdict may be subject to a relevant statutory cap on damages.

In these situations, the amount of the subsequent recovery does not change the fact that a jury has entered a finding of fact as to the "total damages" and comparative fault. These are the only requirements of §287.150.3. It is the total damages that the statute uses to determine the subrogation interest, not the judgment amount. Judge Blackmar's opinion incorrectly makes the judgment and its status the determining factor.

Most importantly, the stated public policy of Missouri is to encourage peaceful settlements and to avoid further litigation. Blackstock v. Kohn, 994 S.W.2d 947, 954 (Mo. banc 1999) and Andes v. Albano, 853 S.W.2d 936, 940 (Mo. banc 1993). If the majority's opinion stands, the practical effect will be to discourage settlements and force litigants to carry all third party cases through the entire post-trial and appeal process, regardless of the realistic chance of collecting the judgment and even though some amount can be collected for the injured party and the employer/insurer. This will be the only way to avoid nullification of the verdict, as Judge Blackmar claims occurred in this case. This will unnecessarily jeopardize compensation for victims and will be a tremendous waste of judicial resources.

Application of the clear language of §287.150.3 will be fair, definite, consistent, will leave no room for future argument, interpretation or confusion and will not discourage settlements. Therefore, this Court must affirm the trial court's judgment.

CONCLUSION

For the reasons set forth above, the trial court's judgment should be affirmed.

Respectfully submitted,
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IN THE SUPREME COURT
STATE OF MISSOURI

ROXANNE KERPERIEN,	)	
Plaintiff/Respondent,	)	Appeal No. SC 84747
	)	
v.	)	
	)	
LUMBERMEN'S MUTUAL	)	
CASUALTY COMPANY,	)	
Defendant/Appellant.	)	

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)

COMES NOW Todd N. Hendrickson, counsel for Respondent Roxanne Kerperien, and hereby certifies that the attached Respondent' Brief complies with the length limits of Rule 84.06(c) and contains 6,924 words. Further, said brief was prepared using Microsoft Office X for Macintosh and counsel for Respondent relied upon said software's word count.

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IN THE SUPREME COURT
STATE OF MISSOURI

ROXANNE KERPERIEN,	)	
Plaintiff/Respondent,	)	Appeal No. SC 84747
	)	
v.	)	
	)	
LUMBERMEN'S MUTUAL CASUALTY COMPANY,	)	
Defendant/Appellant.	)	

CERTIFICATE OF SERVICE

COMES NOW Todd N. Hendrickson, counsel for Respondent Roxanne Kerperien, and hereby certifies that two (2) true copies of the foregoing Respondent's Brief were served this 30th day of October, 2002, by placing said copies in the U.S. mail, postage prepaid, addressed to:

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